IN THE

Circuit Court of Appeals of the United States

FOR THE NINTH CIRCUIT

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation,	*Appellant,*	No. 7009
vs.		
FRANK NOEL,	*Appellee,*	

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE J. STANLEY WEBSTER, *Judge*

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STATEMENT OF THE CASE

On the morning of June 26, 1931, which was the day upon which the loss, which is the basis of this action, occurred, the three trucks and the steam shovel had reached a point along the route at the foot of a long narrow mountainous grade on the John-Day Highway. At this point, and for the first time, the three trucks were connected with wire cables and the steam shovel connected to the rear truck with a log chain. The distance between each truck and between the rear truck and the steam shovel was some 25 or 30 feet. After so connecting the three trucks and steam shovel, they all started up this grade and had proceeded from two hundred to three hundred feet when the steering rod on the steam shovel became so bent that the same could not be operated and at the same time the magneto on the lead truck developed trouble which required immediate attention. Whereupon, the three trucks and the steam shovel were stopped and the chains and cables between the three trucks and between the rear truck and the steam shovel were unfastened and remained so at all times thereafter.

The undisputed testimony was that all of the trucks as well as the steam shovel traveled on their own power at all times; that none of the trucks gave assistance to the other, nor did any of the trucks assist or aid

the steam shovel in any way. The steam shovel was geared much lower than the three trucks and the three trucks would proceed until they had taken the slack out of the cables and the chain, and by a system of hand signals would stop until the steam shovel got up to the rear truck when they would again proceed.

The undisputed testimony in the record was that it would be impossible for the trucks to have assisted the steam shovel in any way, due both to the difference in the gearing, as well as to the fact that the road along which they were traveling was very crooked and an attempt by the trucks to put pressure on the steam shovel would oblige the trucks to pull one against the other. Furthermore, the steam shovel was many tons heavier than the combined weight of the three trucks.

The defendant's own witnesses, and all of them, testified that there was no towing at any time, all of the trucks, and the steam shovel, being on their own power. Further, that the trucks and the shovel had been placed where this accident happened for some 35 or 45 minutes, during which time, there was no attempt to move any of the trucks or the steam shovel, and it was while they were so stopped, that the accident in question took place.

This grade upon which they were stopped, was very steep, very narrow, and very crooked. It appears that one of the mechanics, witness for the defendant, was working on the magneto under the hood of the leading truck when the brake on the same became unfastened, permitting the lead truck to go down the grade and evidently coming in contact with the second truck, and the second truck in turn with the third truck, all three going over the grade and down into a canyon some two to three hundred feet deep.

It also appears from the defendant's evidence, that this dirt and gravel road was quite moist and as the trucks came together the side of the road gave way and the road in giving away permitted the steam shovel to tip over partly on the road and partly off. The steam shovel remained in this position for several minutes and then later the shovel also went over the precipice into the canyon, indicating conclusively that the trucks were not fastened to the steam shovel, otherwise they would have all gone over together. It is true that the witness Case, for the defendant, testified that all of the trucks were fastened together after they had come to the stop. Upon cross examination, Case testified that he did not go up to the trucks, and did not go beyond the steam shovel, whereupon the court struck all of the testimony of the witness Case from the record, respecting the fastening of the trucks together. Quoting the testimony of C. A. Case:

"There were some one working under the steam shovel. There was a cable or chain between the steam shovel and the three trucks and the trucks next to them. It was fastened when witness noticed. It had to be unfastened so that the workmen could get under the shovel and it was fastened again. Witness did not go beyond the shovel. The three trucks were in front of the shovel. Witness did not know what was between them in looking up, but was guessing. Witness did not see the chains or cables between the trucks and did not go by the back truck or by the shovel." (Trans. p. 62)

"Upon motion testimony of witness was stricken except as in so far that witness testified he saw the log chain fastened from the third truck to the steam shovel which followed. With that exception the testimony of witness with respect to the manner they were fastened, the towing or fastening is stricken from your consideration." (Trans. p. 62)

Again, quoting from the testimony of the same witness:

"Witness traveled over the road after the accident occurred about an hour or an hour and a quarter later. The side or part of the road where the trucks had gone over had broken off about the width of the tread of the equipment. (Trans. p. 63)

Quoting from testimony of John Noel:

"The shovel and tractor weighed about 42 to 45 tons." (Trans. p. 66)

Witness Noel was shown a purported statement made by himself to the adjuster for the insurance

company while the agent was putting on a party in the Franklin Hotel in Seattle and during which party considerable liquor had been consumed and along about six or seven o'clock in the morning a statement was signed. This statement was shown to the witness Noel, by counsel for the insurance company during the trial and a great part of the statement was directly repudiated by the said witness Noel. The statement was never offered in evidence, nor was the insurance adjuster called to the stand although present in court. (Trans. p.p. 66, 67, 69).

It also appeared in the record, that the occasion of hooking the trucks and steam shovel together was purely a precautionary method, so that if anything went wrong with the shovel while traveling this particular part of the road the trucks would hold it in place until the same was blocked, it being the testimony that the steam shovel had no brakes.

Joe Brinier testified that he, personally, took the chain off between the last truck and the steam shovel, and threw it over to the side of the road; and, he was corroborated in this by John Noel. These witnesses also testified that they saw the chain over on the side of the road after the accident. (Trans. p. 73)

The trial court granted the appellee's motion to withdraw the defense of towing from the considera-

tion of the jury, and it was the action of the court upon this sole point that is assigned as error.

ARGUMENT

I

THE INSURED TRUCKS WERE NOT TOWING OR PROPELLING ANY TRAILER OR VEHICLE.

The only point this Court is to determine on this appeal is whether or not any substantial evidence was presented to the effect that the trucks were being "operated, maintained or used for towing or propelling any vehicle."

There is no dispute in the record but that the three truck and the shovel were at all times proceeding under their own power. In holding against the appellant on this question, the trial court took the position that the words "towing" and "propelling", as used in the exclusion clause of the policies necessarily included the idea that it was a pulling of one vehicle by another or that the towing or propelling vehicle furnished motive power in the transportation of the towed or propelled vehicle.

The reason for the Trial Court's ruling, is best explained by quoting its own language, which was as follows:

"Now the testimony you introduced here on your own witnesses shows that * * * what actually happened was that these trucks and this steam shovel, each on its own power, were proceeding up this hill; that these cars while fastened together were not towing and that they were using hand signals to keep the slack in the tow line * * *. * * *and your own witnesses testified that they were not propelled, that the anchor cables were put on to prevent in case of emergency the steam shovel getting over that bank, and your own testimony shows that it didn't tow and it didn't propel * * *. * * * the testimony of each witness that testified upon the subject has been to the effect that none of these automobiles or any more than one, ever at any time propelled that steam shovel. * * * * did not tow the steam shovel or were not fastened together with that intention or for that purpose and some of the witnesses testified that these automobiles couldn't have towed that steam shovel, that each automobile was on its own power is the testimony of the witnesses and that one was not pulling or had not pulled the other * * * and that a system of signals was used when the automobiles would tighten or pull, it being the intention of the parties that in the event of emergency in this hilly pass or the machinery getting off the road and having no blocks itself, could anchor or hold it, and as I recall the testimony there is no testimony where these automobiles towed the steam shovel or they were being used or maintained for the purpose of towing. Under those circumstances I can hardly see how I can submit this question to the Jury. * * * Defendant's own witnesses who have testified upon the point testified in the affirmative that they did not tow and did not intend to tow and that the cars were not used for towing, intended to be used for towing and I do not see * * *." (S. F. 68, 69, 70 and 71)

It is the contention of the appellee that the term "towing" necessarily includes the idea that the one vehicle is drawing another, the one in the lead furnishing the motive power. We have not discovered a case where the term "towing" is legally defined, but the following decisions all indicate that the definition as we have stated it above, is the correct meaning of the term. In the following cases, the word was used as follows: (The italics in each quotation are ours.)

Baker v. Rosaia, 165 Wash. 532; 5 Pac. 2nd, 1019 (at p. 533)

> "At about 10:30 o'clock in the forenoon of the day of the accident, Frank Rosaia and Fred Rosaia, * * * by means of a Lincoln Sedan automobile, *were towing* a Ford touring car in a northerly direction on Fourth Avenue. Frank was in the Lincoln sedan and Fred was at the steering wheel of the Ford. The distance between the two cars was about 10½ feet. The tow line consisted of a steel cable approximately 3-5 of an inch in diameter, * * *"

Farrar v. Whipple (Cal.) 223 Pac. 80:

> "The defendant Gielow was operating his automobile on the same highway in the opposite direction, and at the time of the collision hereinafter referred to was *towing an automobile* owned and steered by the defendant Whipple."

Honeywell v. Mikelson, 144 Wash. 513, 258 Pac. 36 (at page 514):

"The Willys-Knight car was fastened to the wrecking car in the usual method by picking up the front end with a derrick, and the Dodge car was fastened on behind the Willys-Knight car with a rope. The Japanese was placed inside the Dodge car to steer it, and thus connected, appellant proceeded to *tow them* to Everett."

P. 515:

"Instead of making two trips *for the towing of the two cars*, they preferred *to attempt to tow them both together*."

Walcott v. Renault Selling Branch, Inc. 162 N. Y. S., 496, at page 497:

"* * * It (the accident) resulted from the attempt of the deceased to pass between the two vehicles belonging to the defendant, *one of which was being towed by another.* The deceased tripped over the tow line and was thrown violently to the ground, receiving injuries, either from the fall or from being hit by one of the vehicles, which resulted in his death. Both of the vehicles were automobiles. *Only the front one, however, was running by its own power; the rear one being towed by it.*"

Glasgow v. Dorn (Mo. App.) 220 S. W. 509, at page 510:

"* * * notwithstanding the truck was without brakes, defendant's agent *proceeded to tow the car* eastwardly on Washington Avenue for the purpose of reaching the defendant's garage. * * * when the automobiles, *one being towed by the other*, * * *."

Rapetti v. Peugeot Auto Import. Co., 162 N. Y. S. 133:

> "* * * After taking a step or two, both men tripped and fell, and plaintiff severely sprained both wrists. On getting up, plaintiff found that he had tripped over a tow rope, some 18 inches above the sidewalk, *which was attached to the first automobile and was being used to tow the second machine.*"

Canfield v. N. Y. Transp. Co. 112 N. Y. S. 854, at page 855:

> "When the automobile looses its motive power, it must be moved by the application of some outside power. The ordinary and common way is by attaching it to another vehicle *and towing it to the garage.*"

Trudell v. James Cape & Sons Co. (Wis.) 202 N. W. 696:

> "The plaintiff Walter J. Trudell, with his wife sitting in the front seat with him in a Buick car, *were towing two cars in the rear of the Buick* from Chicago to Milwaukee, * * * Floyd Trudell was in the Ford car, steering it, and Russell Trudell was in the Briscoe car, steering it."

The act of drawing one automobile along behind another was also referred to as "towing" in the following cases:

Clayton v. Kansas City Ry. Co., (K. C. App.) 231 S. W. 68;

Jerome v. Hawley, 131 N. Y. S. 897;

Richter v. Dahlman & Inbush Co., (Wis.) 190 N. W. 841;

Steinberger v. California Electric Garage Co., (Cal.) 168 Pac. 570;

Cowley v. Bolander, (Ohio) 166 N. E. 677;

Beaumont v. Beaver Valley Traction Co., (Pa.) 148 Atl. 87;

Broussard v. Teche Trans. Co. (La. App.) 132 So. 136;

Webster's New International Dictionary, 1930 edition, defines the word "towing" as follows:

> "To drag or take along with one. 2. To draw or pull along after, especially through the water by a rope or chain; as, a towboat tows a ship. 3. Act of towing or state of being towed;—chiefly in the phrases to take in tow, that is, to tow, and to take a tow, that is, to avail one's self of towing."

And, in fact, the cases cited in appellant's brief sustain the proposition which we are here making that the term "towing" means the drawing of one vehicle by another, the latter furnishing the motive power.

In *Coolidge v. Standard Accident Insurance Company*, 300 Pac. 885, at page 887, the Court said:

> "The evidence is uncontradicted to the effect that the accident occurred while the plaintiff was driving along the highway in his automobile *to*

> *which a trailer loaded with sheep was attached. The towing of the trailer was in direct contravention of the specific terms of the policy* * * the policy provided that the company shall not be liable for accidents occurring while the automobile was 'used for towing or propelling trailers or other vehicles used as trailers.' Liability for this accident is therefore specifically exempted by the terms of the policy."

In *Conner v. Union Automobile Insurance Company*, 9 Pac. 2d 863, at page 864, the court said:

> "The insured *machine was towing a trailer at the time the accident occurred.*"

The word "propel" is defined in Webster's New International Dictionary, 1930 Edition, as follows:

> "To drive forth or out. To impel forward or onward by applied force; to drive; push;"

and, by Funk and Wagnalls New Standard Dictionary, 1932 Edition, as follows:

> "To drive or urge forward; force onward; cause to move on; especially, to serve as a means of propulsion for (a vehicle, vessel, airplane, etc.)"

It is familiar rule of law, as stated in 13 C. J., at page 531, that "in construing a written contract, the words employed will be given their ordinary and popularly accepted meaning in the absence of anything to show that they were used in a different sense." There can be no doubt in the Court's mind but that the words

"towing" and "propelling" have an ordinary and popularly accepted meaning in general use, which is the furnishing of motive power by one vehicle, machine or conveyance for the drawing or pushing of another vehicle, machine or conveyance. There is nothing in this case to indicate that the words were used or intended in any sense other than this popularly understood meaning.

From the foregoing, it will be seen that at the time of the accident none of the trucks were being used for "towing or propelling any trailer or vehicle"; and that, therefore, consideration of appellant's first affirmative defense was properly withdrawn from the jury.

The cases cited by appellant in its brief are not in point. The quotations above given from the Coolidge and Conner cases demonstrate that in each, the insured automobile, at the time of the accident, was towing an attached trailer.

In the cases of *Maryland Casualty Co. v. Adams* (Miss.) 131 Southern Reporter 544 and *Adams v. Maryland Casualty Co.* (Miss.) 139 Southern Reporter 453, the actions arose out of the same accident, and were based upon the same facts. The following quotation from the latter case, to wit: "This truck was being operated on the highway with a trailer

attached," shows that the insured machine was towing in violation of the terms of the policy.

It is thus clearly demonstrated that in each of the four cases cited by appellant there was no controversy as to whether or not the insured automobiles were engaged in towing, that point being admitted in each instance. Inasmuch as the point decided by the lower court in the case at bar was that the insured trucks under the undisputed evidence, were not being "operated, maintained or used for towing or propelling any trailer or vehicle," the cited cases can be of no help to the court, and no comfort to the appellant.

Appellant attempts to make some point by an alleged argument that the exemption clause in the policy was effective not only when the trucks were "operated or used" for towing or propelling, but also while they were "maintained" for such purpose. We will admit that there is a distinction between these terms, but we are at a loss to know why the appellant has pointed out this distinction, attempting to defeat recovery thereon. There is no more evidence in the record that the trucks were used for towing at any other time, or that they were maintained for that purpose, than there is that they were towing at the time of the accident.

II

THE STEAM SHOVEL DID NOT CONSTITUTE A "VEHICLE," WITHIN THE TERMS OF THE POLICIES

Although the decision of the trial court was evidently based on the holding that the insured trucks were not "towing" or "propelling," the court nevertheless raised a further question when, after reading the provisions of the exclusion clause in the policy he said:

> "Now this steam shovel isn't a trailer; is it a vehicle?" (S. F. 67).

It is the contention of the appellee that the steam shovel was not, and is not, a "vehicle" within the meaning of the policy.

In U. S. Compiled Statutes, 1901, page 4, the following definition is given:

> "The word 'vehicle' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land."

In *Davis v. Petrinovich* (Ala.) 21 S. 344, the court said:

> "A vehicle is any carriage moving on land, either on wheels or runners; a conveyance; that which is used as an instrument of conveyance, transportation or communication."

Bouvier's Law Dictionary defines the word as follows:

> "The term 'vehicle' includes every description of carriage or other vehicle or contrivance used or capable of being used as a means of transportation on land."

Sub-section (6) of Oregon Code, Section 55-101, following the definition of "vehicle," which is quoted on page 9 of appellant's brief, gives the following definition:

> "The term 'motor vehicles' shall mean every self-propelled vehicle moving over the highways of this State * * *"

Sub-section (b) of Section 2 of Chap. 180 of Washington Session Laws 1929, defines motor vehicles as "every vehicle, as herein defined, which is self-propelling."

It is apparent, therefore, that under the statutes of both Washington and Oregon the steam shovel in this case is defined as a "motor vehicle" rather than as a "vehicle," as there was no dispute in the record but that it was proceeding on its own power.

The definitions of "vehicle" appearing in the statutes which the appellant quoted are included in Chapters regulating the operation of vehicles on the highways; and, even if the steam shovel was held to be a vehicle within the meaning of such definition, it

would not necessarily follow that it was a "vehicle" within the meaning of the insurance policy and, it should be given its ordinary and popularly accepted meaning, which is, as demonstrated by the citations above given, "a carriage or contrivance used or capable of being used as a means of conveyance or transportation on land." The steam shovel in this case is not such a carriage or contrivance. Its use is for moving earth, dirt, sand, rocks or other things similar. Although the steam shovel itself can be moved from place to place under its own power, its purpose as such, is not that of being a means of conveyance or transportation; nor is it capable of being so used.

III

THE SCINTILLA OF EVIDENCE RULE

It is the contention of the appellee in this case that there was no substantial evidence of any kind introduced in the case to support the allegations of appellant's first affirmative defense. In this connection, we wish to call to Court's attention the well settled rule in the State of Washington that more than a mere scintilla of evidence is necessary to support a verdict, or to justify the court in submitting a case to the jury.

In *Jones v. Harris*, 122 Wash. 69, 210 Pac. 22, the court said, at page 80:

> "This court early in its history discarded the scintilla of evidence doctrine and has uniformly held that a verdict to be sustained must be supported by substantial evidence."

Dunsmoor v. North Coast Transportation Co., 154 Wash. 229, 281 Pac. 995, the court, at page 231, said:

> "It is incumbent upon the appellant, in order to recover against the respondent, to show that its driver was guilty of negligence. This she must show by substantial evidence—a scintilla of evidence will not do—and, in our opinion, the evidence here is not of that substantial character on which a jury is permitted to found a verdict."

To the same effect are:

Kelly v. Drumheller, 150 Wash. 185, 272 Pac. 731;

Thompson v. Virginia Mason Hospital, 152 Wash. 297, 277 Pac. 691, and

Hansen v. Continental Casualty Co., 156 Wash. 691, 287 Pac. 894.

IV

PORTION OF TESTIMONY ERRONEOUSLY ABSTRACTED

The inherent viciousness of the transcript system of transcribing the evidence from the statement of facts is ably demonstrated in the case at bar. In this regard we wish to call the Court's attention to page 66 of the transcript of record in which it is said:

> "The proof was put into the insurance company in which witness made the statement that

> when the trucks were pulling all three trucks were running and the shovel was also running on its own power so that they would act as an anchor in case the shovel should go backwards, or in case something should break and at the same time they would help the shovel up the grade and it would help us to make better time."

No such evidence was ever introduced in this case, no such written statement by John Noel to the insurance company, if one was in existence, was ever offered in evidence by the appellant nor was the adjuster to whom such a statement was purported to have been made, placed on the stand by the appellant to testify in regard thereto.

The testimony of Mr. John Noel, as shown by the statement of facts, is as follows:

> "Q. And you made a statement to the adjuster in connection with that?
>
> "A. Yes.
>
> "Q. I will ask you, did you not state to the adjuster the following, 'when the trucks were pulling all three trucks were working and the shovel was also running on its own power, so that they would act as an anchor in case the shovel would go backwards, or in case something would break, and at the same time they would help the shovel up the grade and it would help us make better time?' "
>
> "A. No sir, I didn't say anything about making better time.

"Q. I will show you a typewritten statement. Is that your signature?

"A. That is my signature but I didn't make that statement."

(S. F. 45)

On cross examination of this witness, it was shown that the insurance adjuster, Mr. Wasson, was with the witness in the Benjamin Franklin Hotel in Seattle from eight o'clock on the evening previous until six or seven o'clock on the morning when the statement was signed. The testimony also showed that an all night party was held, that liquor was furnished by Mr. Wasson; and that the statement was signed by Mr. Noel about the time when the party broke up at about six or seven o'clock in the morning, when he was in an intoxicated or partially intoxicated condition. (Trans. p. p. 69 and 70).

After that evidence went into the record, the appellant chose not to offer the written statement in evidence; and did not put Mr. Wasson on the stand, although he was present in the court room throughout the trial.

Another instance of a false idea being carried into the transcript, and from there into the appellant's brief, as a result of careless abstracting, is the statement appearing on page 67 of the transcript and on page three of appellant's brief, to the effect that:

"The shovel had been slipping when they were bringing it out as they had had a good deal of rain."

There was no evidence in the record to the effect that the shovel had ever slipped except at the time of the accident when it and the three trucks went over the grade. An examination of the statement of facts discloses that the testimony which was abstracted as above quoted; was given as follows:

"Q. You spoke about the shovel slipping off the grade. As you remember, where was that?

"A. Slipped off the grade—that must have been when it was wrecked.

"Q. I understood you had a good deal of rain when you having—

"A. That was on any grade—three or four miles from the grade, this grade.

"Q. Did your shovel slip when you were bringing it out?

"A. No it just slipped * * * ." (S. F. 46)

V.

POLICY CONSTRUED AGAINST INSURER

The fastening together of the trucks, or of the trucks with any other contrivance, was not listed in the policies as a situation wherein the company's liability under the policies did not extend. It is a famil-

iar rule of law that an insurance policy will be construed most strongly against the insurer.

> *Stipcich v. Metropolitan Life Ins. Co.*, 277 U. S. 311, 72 L. Ed. 895.
>
> *Globe & Rutgers Fire Ins. Co. v. King Foong Silk Filature*, 18 Fed. 2nd 6.
>
> *Insurance Co. of North America v. Rosenberg*, 25 Fed. 2nd 635.

This rule, and the reason for it, was informally stated by the trial court in rendering its oral decision as follows:

> "This policy of insurance was written by the insurance company and it had the choice of words that it wished to employ to advise the liability which was not to be covered by this policy, and having chosen words of apt meaning, the Court is not going to write into this policy a provision broader than the company has been pleased to adopt for its own protection." (S. F. 69)

CONCLUSION

The only point urged by the appellant on this appeal is that the trial court erred in not submitting to the jury the question of whether or not the insured trucks were "operated, maintained or used for towing or propelling any trailer or vehicle."

There can be no doubt that the trucks were not being operated or used for towing or propelling a

trailer or vehicle at the time of the accident since, first, the whole caravan consisting of the three trucks and the steam shovel had been at rest in the road for some considerable time before the accident occurred; and, second, when they were proceeding up the grade, each truck and the steam shovel was traveling solely under its own power. As heretofore stated, as established by the authorities above cited, and as the trial court held as a matter of law, the trucks were not engaged in towing or propelling at the time of the accident, nor had they been maintained or used for that purpose.

Not only was there no evidence of towing or propelling, which, under the scintilla of evidence rule, is necessary in order to require a submission of the case to the jury, but there was not even a scintilla of evidence to establish towing or propelling.

While the question of towing or propelling is the important one in this case, and while we consider it decisive of this appeal, if this Court should be of the opinion that there was in fact towing or propelling, then we insist that the exception clause does not apply because of the fact that the steam shovel was not a "vehicle" within the meaning of the policy.

We therefore submit that the action of the trial court in withdrawing the case from the jury as to all matters except the question of value of the trucks, was proper; that it was not only the privilege, but the duty, of the trial court, to so act; and that the judgment of the District Court herein should be affirmed.

Respectfully submitted

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